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No. 91-845

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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THOMAS DEAN VOGT, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

MERVYN HAMBURG
*Attorney*

*Department of Justice*
*Washington, D.C. 20503*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether the evidence was sufficient to convict petitioner of conspiracy to distribute cocaine.

2. Whether petitioner was entitled to a downward departure from his Sentencing Guidelines sentencing range because the evidence did not show that he derived any financial gain from his drug distribution activities.

3. Whether the sentencing judge properly computed the amount of cocaine attributable to petitioner for purposes of sentencing under the Sentencing Guidelines.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-6a, is unpublished, but the judgment is noted at 938 F.2d 184 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on May 15, 1991. A petition for rehearing was denied on June 25, 1991. On September 18, 1991, Justice Blackmun granted an extension of time within which to file a petition for a writ of certiorari until

November 22, 1991, and the petition was filed that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner and four co-defendants were indicted in the United States District Court for the Northern District of Iowa on 25 counts of violating the federal narcotics laws and obstructing justice. Petitioner was convicted of distributing cocaine to a person under the age of 21, in violation of 21 U.S.C. 841(a)(1) and 845(a) (to be recodified as 21 U.S.C. 859(a)); possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); making his house available for distributing and using cocaine, in violation of 21 U.S.C. 856; and conspiring (a) to possess cocaine with intent to distribute it, (b) to distribute cocaine, (c) to distribute cocaine to a minor, and (d) to make a building available for storing, distributing, and using cocaine, in violation of 21 U.S.C. 846.[1] Petitioner was sentenced to 110 months in prison, to be followed by five years of supervised release, and was fined $12,500. Pet. Sent. Tr. 138-139.[2] The jury returned a special verdict identifying certain properties to be forfeited under

[1] Prior to trial, two of petitioner's co-defendants, Ronald Kelley and Rodney Jiruska, each pleaded guilty to conspiracy to violate the federal drug laws. Gov't C.A. Br. 1. Following a jury trial, petitioner's other co-defendants, Harry Ambrose and Larry Regennitter, were convicted on a variety of charges, including conspiracy to violate the federal drug laws. *Ibid.*; Pet. App. 3a.

[2] "Pet. Sent. Tr." refers to the sentencing hearing pertaining only to petitioner. "Sent. Tr." refers to the transcript of the joint sentencing hearing concerning petitioner, Ambrose, and Regenniter.

21 U.S.C. 853(a). The court of appeals affirmed. Pet. App. 1a-6a.

1. The evidence at trial established that petitioner and his co-defendants engaged in a conspiracy to purchase large amounts of cocaine from common sources and to distribute it at locations in and around Cedar Rapids, Iowa. Petitioner and his co-defendants acquired the cocaine primarily from a common group of suppliers consisting of Tim Johnson, Keith McVay, and Lonnie Vogt, petitioner's younger brother. Gov't C.A. Br. 11, 14.[3] The suppliers knew that petitioner and his co-defendants, including Harry Ambrose and Larry Regennitter, would redistribute the cocaine to various common friends, usually in social settings. *Id.* at 11-12. In turn, petitioner and his co-defendants were aware that Johnson, McVay, and Lonnie Vogt sold and supplied cocaine in and around Cedar Rapids and Iowa City. On several occasions, petitioner, Ambrose, and Regennitter each bought up to an ounce of cocaine from their common suppliers, after which they personally redistributed it among themselves and to others jointly known by them (including the suppliers) in various social settings. The distributions occurred at safe locations, such as the homes, businesses, and limousines of petitioner and his co-defendants. *Id.* at 13-15. The purpose underlying those distributions of cocaine was to advance petitioner and his co-defendants socially and sexually. *Id.* at 11.

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[3] Johnson purchased cocaine from sources in Florida. When Johnson made his initial purchase from his Florida suppliers, petitioner furnished him with $3000 to enable Johnson to make a large purchase at a good price. Johnson repaid petitioner over time, principally by providing him with cocaine. Tr. 1289.

The evidence at trial showed that petitioner personally purchased cocaine from Johnson approximately 30 times between 1985 and 1987, in quantities ranging from a gram to an ounce. Tr. 1270. Petitioner invited Johnson to parties at his home on approximately five occasions; cocaine was present for general consumption at those parties, and Johnson saw petitioner laying out cocaine for the guests to use. Tr. 1284-1285. Petitioner also bought cocaine on several occasions from McVay, in quantities ranging up to an ounce. See Tr. 186-198. McVay attended parties at petitioner's residence approximately 15 to 20 times; he testified that cocaine was placed on a mirror in petitioner's bedroom for consumption by petitioner and others. Tr. 188-190.

Young women frequently attended the parties hosted by petitioner and his co-defendants. Gov't C.A. Br. 11, 15-16. On approximately 20 occasions in 1987 and 1988, petitioner engaged in sexual activity at his home with a prostitute who was 19 years old in 1987. Petitioner furnished her with cocaine each of the times he saw her. Tr. 760-768.

2. Following petitioner's conviction, the probation officer prepared an extensive Presentence Report (PSR) attributing 5,180.01 grams of cocaine to petitioner. PSR ¶ 274. Applying the Drug Quantity Table appended to Sentencing Guidelines § 2D1.1, the probation officer calculated a base offense level of 32. PSR ¶ 275. He added two levels for obstruction of justice, *id.* ¶ 279, which resulted in an adjusted offense level of 34. *Id.* ¶ 281.

Petitioner disputed the computations. The district court held a four-day sentencing hearing, during which the court considered petitioner's objections to the Presentence Report. In its final quantity deter-

minations, the court reviewed the Presentence Report's assessments paragraph by paragraph and made specific findings regarding the amount of cocaine chargeable to petitioner. Many of the quantities charged to petitioner in the Presentence Report were stricken, and the district court ultimately attributed only 861.45 grams of cocaine to petitioner. The court accordingly lowered petitioner's base offense level to 26 for drug quantity.

Among his claims, petitioner challenged the probation officer's inclusion of certain quantities of cocaine that were distributed by his unindicted coconspirator McVay. Pet. Objections to PSR ¶¶ 28, 30. Those amounts were assessed against petitioner as reasonably foreseeable distributions in furtherance of the conspiracy. Sent. Tr. 394-395; see Guidelines § 2D1.4, Application Note 1 (Oct. 1987). The evidence regarding McVay focused on two transactions. First, petitioner purchased a half-ounce that McVay removed from a package containing two ounces. PSR ¶ 62. In the second, McVay sold an ounce of cocaine to petitioner and told petitioner that the ounce was part of a half-pound purchase McVay had just made. *Id.* ¶ 64. The district court found that petitioner should be charged with the gross amounts that McVay possessed, and not merely the amounts McVay sold to petitioner. See Sent. Tr. 394-395.

The final computation by the court also included 250 grams relating to petitioner's purchases from Johnson. The probation officer had calculated the amount at 425.25 grams, based upon Johnson's trial testimony that he made at least 30 sales of cocaine to petitioner in quantities ranging from a gram to an ounce. PSR ¶50. The probation officer calculated that figure by multiplying 30 sales by an estimated "middle range" of one-half ounce of cocaine per sale.

*Ibid.* Petitioner disputed the computation, claiming that he should be assessed only 21 grams for his purchases from Johnson. Tr. 387-388. Following the sentencing hearing, the court rejected petitioner's calculation, but reduced the chargeable amount to 250 grams. Pet. 15.

3. Petitioner asked the court to depart downward from the Guidelines range, arguing that the Guidelines did not take into account distributions that were not intended for profit. The district court rejected that contention, noting that a desire for financial gain is not an element of the narcotics offenses with which petitioner was charged. Pet. Sent. Tr. 89. The court added that in its view the Sentencing Commission had implicitly considered and rejected the absence of a profit motive as a factor bearing on the appropriate sentence to be imposed in drug cases. *Ibid.*

4. The court of appeals affirmed petitioner's convictions and sentence in an unpublished opinion. Pet. App. 1a-6a. The court first held that the evidence was sufficient to support his conviction for conspiracy. *Id.* at 3a. It then rejected challenges to the district court's factual findings concerning the quantity of cocaine chargeable to petitioner, *id.* at 4a-5a, and it affirmed the district court's decision not to depart downward from the Guidelines sentencing range for petitioner's offense, *id.* at 5a. The court further held that it could not review the district court's refusal to depart downward "for circumstances the commission failed to consider" when formulating the Guidelines. *Ibid.*

## ARGUMENT

1. Petitioner contends that he was not a member of a conspiracy to distribute cocaine because his drug associations occurred in a social, rather than commercial, context. Pet. 19-25. Congress, however, broadly defined "distribute" to mean, "to deliver (other than by administering or dispensing) a controlled substance or a listed chemical." 21 U.S.C. 802(11). By defining the word "distribute" in terms of delivery, and not sale, Congress prohibited individuals from supplying such drugs to others for social use. See, *e.g.*, *United States* v. *Corral-Corral*, 899 F.2d 927, 936 n.7 (10th Cir. 1990); *United States* v. *Ramirez*, 608 F.2d 1261, 1264 (9th Cir. 1979) (a non-commercial sharing constitutes a distribution); see also *United States* v. *Coady*, 809 F.2d 119, 124 (1st Cir. 1987). Accordingly, a conspiracy to distribute drugs—even for social purposes—violates the federal narcotics laws just as much as a conspiracy to distribute drugs for profit.

Petitioner errs in asserting that the decision below conflicts with *United States* v. *Hardy*, 895 F.2d 1331 (11th Cir. 1990). The court of appeals in *Hardy* held that the evidence was insufficient to convict the defendant of a conspiracy to distribute cocaine. The evidence in that case showed that the defendant regularly hosted parties attended by drug users and suppliers, and often used cocaine himself. But the only evidence supporting the charge that Hardy conspired to distribute cocaine was that he once purchased one-eighth of an ounce of cocaine to use with a friend and on another occasion gave a small amount of cocaine to a house guest. *Id.* at 1334. The court found Hardy's two isolated instances of sharing or

transferring small amounts of cocaine insufficient to sustain an inference that he had agreed to engage in distribution. *Id.* at 1334-1335.

In this case, by contrast, the evidence established that petitioner financed Tim Johnson's initial purchase of cocaine in Florida and subsequently purchased up to an ounce of cocaine from Johnson approximately 30 times. Tr. 1270, 1289. Petitioner repeatedly purchased cocaine from Keith McVay as well. Tr. 186-198. On several occasions, petitioner and his co-defendants purchased cocaine from common suppliers, and shared and redistributed it among themselves and other persons jointly known to them (including their common suppliers). Gov't C.A. Br. 15. The government's proof therefore established a course of joint conduct beginning with petitioner's provision of "seed money" for the first cocaine purchase and ripening into an agreement under which petitioner and his co-defendants acquired cocaine from common suppliers and redistributed it among themselves and to others for their mutual benefit. *Id.* at 14-16. The court of appeals properly held that there was sufficient evidence to sustain petitioner's conspiracy conviction. Pet. App. 3a.

2. Petitioner argues that the district court erred in denying him a downward departure from the Sentencing Guidelines sentencing range based on the fact that he did not engage in a narcotics distribution conspiracy for profit.[4] Pet. 26-37. A district court may

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[4] We agree with petitioner's statement, Pet. 35-37, that a court of appeals may not review a discretionary decision not to depart, but may review a claim that a district court erred in holding that it was without authority to depart. See, *e.g.*, *United States* v. *Bierley*, 922 F.2d 1061, 1066 (3d Cir. 1990). To the extent that the opinion of the court of appeals misstates the standard of review, see Pet. App. 5a, that mis-

depart from the range of punishment set by the Guidelines if it finds a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). Several Guidelines relating to offenses other than petitioner's offenses of conviction explicitly provide for decreased offense levels when a defendant has not acted for profit. Guidelines § 2G1.1, Application Note 1 (transportation for the purpose of prostitution or prohibited sexual conduct), § 2L1.1(b)(1) (smuggling, transporting, or harboring an unlawful alien), § 2L2.1(b) (trafficking in evidence of citizenship or documents authorizing entry), § 2L2.3(b) (trafficking in a United States passport). Those provisions indicate that the Commission explicitly considered when the lack of a profit motive should result in a lower sentence for an offense described in the Guidelines; in light of those provisions, the Commission's failure to provide for such an adjustment in the case of narcotics offenses appears clearly to have been the product of a considered decision.

We recognize that the Guidelines provide that a court "may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines." Guidelines § 5K2.0 (Nov. 1, 1989). But the Commission expressly limited such authority to circumstances in which the district court "determines that, *in light of unusual circumstances*, the guideline level attached to that factor is inadequate." *Ibid.*

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statement does not merit this Court's review; the decision of the district court was correct, and the opinion of the court of appeals is unpublished and therefore without precedential value, 8th Cir. R. 47B, App. I.

(emphasis added). Petitioner has suggested no "unusual circumstances" accompanying his lack of profit motive that would support a departure from the Commission's implicit determination that the absence of a profit motive should carry no weight in setting the penalty for narcotics offenses.[5]

3. Petitioner next contends that the district court made insufficient findings concerning (a) the 283.5 grams of cocaine attributed to him based on two purchases from McVay, and (b) the 250 grams of cocaine attributed to him based on his 30 purchases from Johnson. Pet. 38-47.

a. With respect to the disputed amounts attributable to petitioner's purchases from McVay, the district court charged petitioner with 56.7 grams (two ounces) and 226.8 grams (one-half pound). The court did so based on McVay's testimony that petitioner had, on two occasions, purchased smaller quan-

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[5] That determination is entirely reasonable, as this case demonstrates. Petitioner "was a purveyor and distributor of a siz[e]able quantity of cocaine to the score and more of persons who appeared * * * and testified against him. He has been found by the jury to have been part of a conspiracy that lasted for years, and the testimony clearly shows he committed uncounted overt acts in furtherance of that conspiracy." Pet. Sent. Tr. 127. Petitioner also created a market for the narcotics sold by his co-conspirators—Johnson, McVay, and Lonnie Vogt—who profited financially from the conspiracy of which petitioner was a part. Petitioner also provided the financing necessary for Johnson to initiate his Florida cocaine purchases. Tr. 1289. In addition, by distributing cocaine free of charge and providing safe places to use it, petitioner encouraged the consumption of cocaine by those who might not otherwise have acquired or used the drug. As the district court noted, petitioner "was not a mere recreational user who committed a * * * 'technical' * * * violation of the drug distribution laws." Pet. Sent. Tr. 127.

tities of cocaine (a half-ounce and an ounce) with the knowledge that McVay was selling those drugs from larger quantities (two ounces and a half pound) in his possession. Petitioner does not dispute that he could be assessed with the larger quantities of cocaine if McVay's possession of those amounts was in furtherance of the conspiracy and reasonably foreseeable by petitioner, Pet. 38-39; he claims merely that the district court did not make adequate findings that McVay possessed the cocaine in furtherance of the conspiracy, Pet. 39-42.

The record makes it clear that the district court found that McVay possessed the larger amounts of cocaine in furtherance of a conspiracy with petitioner. During the sentencing hearing, the court specifically requested that the parties address the quantities of cocaine attributable to petitioner under Guidelines § 2D1.4, Application Note 1. Sent. Tr. 371. The court explained that Section 2D1.4 allowed the imposition of sentence based upon the defendant's conduct or the conduct of his co-conspirators that was in furtherance of the conspiracy and known or reasonably foreseeable to the defendant. Sent. Tr. 371. After hearing argument from the government, *id.* at 372-374, and petitioner, *id.* at 388, the court specifically adopted, "under the co-conspirator rule," *id.* at 395, the probation officer's findings attributing to petitioner two ounces (56.7 grams) and one half pound (226.8 grams) of cocaine.[6]

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[6] Petitioner makes the conclusory assertion that there was no evidence to support a finding that he had an agreement with McVay regarding the sale of drugs to other people. Pet. 41-42. The district court, however, was justified in inferring from the evidence of the intimate and mutually beneficial dealings among the co-conspirators, including petitioner and McVay, that petitioner and McVay were co-conspirators in

b. Petitioner also contests the attribution to him of 250 grams of cocaine in connection with 30 sales made to petitioner by Johnson. Pet. 42-47. Based on Johnson's testimony that petitioner purchased cocaine from him on at least 30 occasions, in quantities ranging from a gram to an ounce, Tr. 1270-1271, the probation officer estimated an average of one-half ounce per sale and assessed 425.25 grams against petitioner for 30 purchases. PSR ¶ 50. Petitioner objected to that assessment, claiming that a more accurate estimate of his purchases from Johnson was one-eighth of an ounce on 10-12 occasions—a total of 42 grams. Pet. Objections to PSR ¶ 21. Petitioner would have excluded half that amount for personal use, leaving 21 grams attributable to him from his purchase from Johnson. *Ibid.*[7] After considering petitioner's objection, the district court arrived at an estimate of 250 grams, or slightly in excess of one-quarter ounce per sale multiplied by 30 sales.

The district court did not clearly err in making that estimate. Where, as here, "there is no drug seizure or the amount seized does not reflect the scale of the offense," the Sentencing Guidelines provide that the district court "shall approximate the

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the distribution scheme and that McVay possessed the larger amounts in furtherance of the conspiracy. Petitioner misplaces reliance, Pet. 41, on *United States* v. *North*, 900 F.2d 131, 133-134 (8th Cir. 1990), and *United States* v. *Carmody*, 753 F. Supp. 917, 918-919 (M.D. Ala. 1990), aff'd, 940 F.2d 673 (11th Cir. 1991) (Table)—which merely establish that a defendant cannot be charged with quantities of narcotics based on a co-conspirator's sales if the conspiracy in which the defendant is involved does not contemplate such other distributions.

[7] Petitioner now contends that his testimony showed that he purchased no more than 99 grams from Johnson. Pet. 45.

quantity of the controlled substance." Section 2D1.4, Application Note 2. The court's estimate here reflected a thorough familiarity with extensive testimony at a lengthy trial, a credibility determination, and a conservative calculation of quantity that was well below even the "middle range," PSR ¶ 50, that the probation officer had estimated. The court of appeals therefore properly affirmed petitioner's sentence. See *United States* v. *Paulino*, 935 F.2d 739, 756 (6th Cir. 1991) (affirming findings based on conservative estimate of drug quantities).

In any case, petitioner acknowledges that the Eighth Circuit has adopted the proper framework in approximating drug quantities under Section 2D1.4. See Pet. 46 (citing with approval and relying on *United States* v. *Lawrence*, 915 F.2d 402, 408 (8th Cir. 1990)). He claims only that the court misapplied its own precedent in its unpublished opinion here. Even if such a claim otherwise merited this Court's review, but see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), it would not in this case. If the district court had assessed petitioner with 21 grams (as he requested), rather than 250 grams, the difference would have been insufficient to reduce petitioner's base offense level below level 26.[8] Guidelines § 2D1.1 (Drug Quantity Table). Thus, even if the district court erred, that

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[8] The district court made a final quantity determination of 861.45 grams of cocaine. If the court had assessed petitioner with 21, and not 250, grams of cocaine based on his purchases from Johnson, the final quantity charged to petitioner would have been 632.45 grams. Under the Drug Quantity Table applicable to petitioner's offense, that amount would give rise to a base offense level of 26, Guidelines § 2D1.1—the same level that the court assessed based on the larger quantity.

error was harmless. *United States* v. *Frondle*, 918 F.2d 62, 65 (8th Cir. 1990), cert. denied, 111 S. Ct. 1400 (1991).[9]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

MERVYN HAMBURG
*Attorney*

FEBRUARY 1992

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[9] Contrary to petitioner's contention, the district court did not violate Fed. R. Crim. P. 32(c)(3)(D). That Rule provides in relevant part that if the defendant alleges a factual inaccuracy in the presentence report, the court shall make a "finding as to the allegation." Fed. R. Crim. P. 32(c)(3)(D)(i). In this case, petitioner alleged that the Presentence Report erroneously assessed 424.5 grams of cocaine in connection with his purchases from Tim Johnson; the district court made a finding that the proper assessment against petitioner was 250 grams.

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